FILE COPY

DEC 2 0 1965

JOHN F. DAVIS, CLERK

No. 22, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States,

Defendant.

AMICUS CURIAE BRIEF IN BEHALF OF THE STATE OF LOUISIANA

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
ALFRED AVINS, J.S.D., PH.D.
(Cantab.)
Special Counsel

No. 22, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH
Attorney General of the
United States,

Defendant.

MOTION FOR LEAVE TO ORALLY ARGUE

In accordance with this Honorable Court's invitation contained in its order of November 5, 1965, the State of Louisiana hereby expresses a desire to be permitted to participate in the oral argument of this case whenever heard.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
Special Counsel.

No. 22, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH
Attorney General of the
United States,

Defendant.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The STATE OF LOUISIANA, by its Attorney General and its Special Counsel, asks leave of the Court to present its Amicus Curiae Brief, in accordance with this Honorable Court's invitation contained in its order of November 5, 1965.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
Special Counsel.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT AND AUTHORITIES	
A. Any state has the constitutional right to impose a literacy test as a qualification for voters, and congressional interference with such right violates the Tenth Amendment	2
B. The presumption that a state is using a literacy test to discriminate based on race, color, or previous condition of servitude because less than 50 per centum of the persons of voting age were registered or voted in a certain election is beyond congress' power to make and forbidding a literacy test based on such presumption is not an enforcement of the Fifteenth Amendment	6
1. Congress is constitutionally limited in its creation of statutory presumptions	6
2. The presumption of racial discrimination based on a low vote is unconstitutional	11
CONCLUSION AND PRAYER	15
CERTIFICATE OF SERVICE	16

LIST OF AUTHORITIES

Page

Carrington v. Rash, 380, U.S. 89, 91 (1965) 5

Colon-Rosich v. People, 256 F.2d 393 (1st Cir. 1958) 10

Government of Virgin Islands v. Torres, 161 F. Supp. 699 (V.I. 1958) 10

Great Atlantic & Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938) 9

Huber v. Reilly, 53 Pa. St. 112, 115-6 (1866) 3

Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954) 9

Lassiter v. Northampton Election Board, 360 U.S. 45, 53-54 (1959) 5

Local 357, International Brotherhood of Teamsters v. N.L.R.B., 365 U.S. 667, 674 (1961) 12

Louisiana v. United States, 380 U.S. 145 (1965) 14

McKay v. Campbell, 16 Fed. Cas. 157, 160, No. 8839 (Ore. 1870) 3

Minor v. Happersett, 21 Wall. 162, 177-8 (1875) .. 4

Mississippi v. United States, 380 U.S. 128 (1965) 14

Morgan v. Katzenbach (U.S. Dist. Ct., Dist. of Col., Nov. 15, 1965, unreported.) 13

Mott's Super Markets, Inc. v. Frassinelli, 25 Conn. Supp. 160, 199A.2d 716 (1964) 9

People v. Bellfield, 210 N.Y.S.2d 450 (1961) 10

People v. Stevenson, 26 Cal. Repts. 297, 376, P.2d 297 (1962) 10

People v. Gazulis, 212 N.Y.S. 2d 910 (1961) 10

Page

Pope v. Williams, 193 U.S. 632, 633 (1904) 5

Rawdon v. Garvie, 227 S.W.2d 261 (Tex. Cir. App. 1950) 9

Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 7A.2d 302, 315 (1939) 10

Spragins v. Houghton, 3 Ill. 377, 395-6 (1840) 3

State v. Birdsell, 235 La. 396, 104 So.2d 148 (1958) 10

Tot v. United States, 319 U.S. 463, 467-8 (1943).. 7

United States v. Ramono (Oct. Term, 1965, No. 2, unreported) 9

Western & Atlantic Railroad v. Henderson, 279 U.S., 639, 642 (1929) 8

Wiley v. Sampson-Ripley, 151 Me.400, 120 A.2d 289 (1956) 9

No. 22, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States,

Defendant.

AMICUS CURIAE BRIEF IN BEHALF OF THE STATE OF LOUISIANA

STATEMENT

This brief amicus curiae is filed by the STATE OF LOUISIANA pursuant to this Court's order of November 5, 1965, granting to any interested State the right to submit such a brief in the above-entitled case. The interest of the State of Louisiana stems from the fact that the Voting Rights Act of 1965, Public Law 89-110, 89th Congress, S-1564, directly affects the State of Louisiana by setting aside that State's literacy test. La. Rev. Stat., Title 18, § 31.

SUMMARY OF ARGUMENT

The Tenth Amendment reserving all powers to the States not delegated to the Federal Government

is violated by the Voting Rights Act because each State has the constitutional right to determine the qualifications of voters, and it may exercise this right to impose a literacy test which does not discriminate based on race, color, or previous condition of servitude.

Congress is limited by the Fifth Amendment in respect to the statutory presumptions which it may create. Such a presumption must be a logical inference from the known fact, and not based on mere speculation or surmise. In the instant case, the mere fact that less than 50 per centum of a State's adults were registered or voted does not show that a literacy test it imposes was used to engage in racial discrimination. Abolition of the State's literacy test is not an enforcement of the Fifteenth Amendment, but rather an enlargement of that Amendment. There are many other tools that Congress can use to enforce the Amendment without violating the Constitution by infringing on valid State powers.

ARGUMENT

POINT I.

ANY STATE HAS THE CONSTITUTIONAL RIGHT TO IMPOSE A LITERACY TEST AS A QUALIFICATION FOR VOTERS, AND CONGRESSIONAL INTERFERENCE WITH SUCH RIGHT VIOLATES THE TENTH AMENDMENT.

Before the ratification of the Fifteenth Amendment, the States had exclusive control over the qual-

ification of voters for all offices. Constitution of the United States, Art. I, §§ 2, 4. See also *Spragins v. Houghton*, 3 III. 377, 395-6 (1840); *Huber v. Reilly*, 53 Pa.St. 112, 115-6 (1866); Cf. *McKay v. Campbell*, 16 Fed. Cas. 157, 160, No. 8839 (Ore. 1870). The enactment of the Fifteenth Amendment simply restrained the States from making any discrimination based on race, color, or previous condition of servitude. In all other respects, the States continued to be free in setting such qualifications for voters as they might choose.

The above rule was recognized and reaffirmed by the members of Congress who played a leading part in the drafting and proposal of the Fourteenth and Fifteenth Amendments. Thus, Congressman John A. Bingham, the Radical Republican from Ohio who drafted the First Section of the Fourteenth Amendment, declared on behalf of the House Judiciary Committee that the franchise was not a "privilege or immunity of citizens of the United States" and that "the adoption of the Fifteenth Amendment of the Constitution imposing these three limitations upon the power of the several States, was, by necessary implication, a declaration that the States had the power to regulate by a uniform rule the conditions upon which the elective franchise should be exercised by citizens of the United States resident therein." House of Representatives, Report No. 22, 41st Cong., 3rd Sess. 2-3 (Jan. 30, 1871). Likewise, a unanimous Senate Judiciary Committee reported:

"The fifteenth amendment . . . must be regarded

> as recognizing the right of every State, under the Constitution as it previously stood, to deny or abridge the right of a citizen to vote on any account, in the pleasure of such State; and by the fifteenth amendment the right of States in this respect is only so far restricted that no State can base such exclusion upon 'race, color, or previous condition of servitude.' With this single exception —race, color, and previous condition of servitude —the power of a State to make such exclusion is left untouched, and, indeed, is actually recognized by the fifteenth amendment as existing." Senate Report No. 21, 42nd Cong., 2nd Sess. 4-5 (Jan. 25, 1872).

The principle that the qualifications of voters are within the exclusive control of the States has been reaffirmed time and again by this Court. Only a few years after the ratification of the Fifteenth Amendment, this Court held in *Minor v. Happersett*, 21 Wall. 162, 177-8 (1875):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

A quarter of a century later, this Court again reviewed the rights of States to establish qualifications

for voting, and once again held in *Pope v. Williams*, 193 U.S. 632, 633 (1904):

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. . . . It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper. . . ."

Only last year, the Court reaffirmed the same principle in *Carrington v. Rash*, 380 U.S. 89, 91 (1965), where it declared:

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, 'the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.'"

Dealing specifically with literacy tests, this Court unanimously concluded in *Lassiter v. Northampton Election Board*, 360 U.S. 45, 53-54 (1959):

> "The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determin-

ing whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot."

The right of each State, therefore, to impose a literacy test or other test or qualification upon a voter is not an open question, either in regard to the original intent of the framers of the Fifteenth Amendment, or this Court. Since this power to impose a literacy test is one reserved to the States, any attempt by Congress to interfere with such a State-imposed test violates the Tenth Amendment.

POINT II.

THE PRESUMPTION THAT A STATE IS USING A LITERACY TEST TO DISCRIMINATE BASED ON RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE BECAUSE LESS THAN 50 PER CENTUM OF THE PERSONS OF VOTING AGE WERE REGISTERED OR VOTED IN A CERTAIN ELECTION IS BEYOND CONGRESS' POWER TO MAKE AND FORBIDDING A LITERACY TEST BASED ON SUCH PRESUMPTION IS NOT AN ENFORCEMENT OF THE FIFTEENTH AMENDMENT.

A. Congress is Constitutionally Limited in Its Creation of Statutory Presumptions.

The constitutionality of the Voting Rights Act must rest, if it has any basis at all, on Section 2 of the

Fifteenth Amendment, which gives Congress the right to enforce Section I by "appropriate" legislation. Since a literacy test is neither a race, color, or previous condition of servitude, it follows that Congress is not enforcing the First Section but rather adding to it. This alone is enough to invalidate the statute.

However, the Congressional theory seems to be that if a literacy test is imposed with the intent of disqualifying voters of a particular race or color (no doubt, Negroes here), then Congress may ban such a test as a means by which the prohibited discrimination is effectuated. Although the legislative history of the Fifteenth Amendment does not permit Congress to act on mere motive when the discrimination itself is not based on the three prohibited factors, assuming *arguendo* that Congress may base its action on the intent of the State legislators in instituting a literacy test, nevertheless, Congress is not at liberty to find or presume such motive from any set of facts which it may choose. The Due Process Clause of the Fifth Amendment must be complied with in the making of such presumptions. In *Tot v. United States*, 319 U.S. 463, 467-8 (1943), this Court held:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act trangresses those limits."

"The Government seems to argue that there are

> two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there bo no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitary because of lack of connection between the two in common experience."

In the *Tot* case, this Court held that a statutory presumption that a person who had previously been convicted of a crime of violence had obtained a firearm found in his possession from interstate sources after the effective date of the statute was unconstitutional because it was equally possible that he obtained the firearm in intrastate commerce or obtained it before the date of the statute. In other words, a presumption is unconstitutional if the fact which "triggers" the fact presumed is equally consistent with the absence of the fact presumed.

Likewise, this Court held in *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639, 642 (1929):

> "A statute creating a presumption that is arbitrary . . . violates the due process clause of the Fourteenth Amendment, Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property."

The most recent example of this occurred only this term. *In United States v. Romano* (Oct. Term, 1965, No. 2, unreported), this Court held unanimously that a federal statute stating that guilt of the crime of possession, custody, or control of an illegal still may be inferred from proof of the defendant's presence near the still was unconstitutional. This rule was laid down in spite of the fact that a considerable portion of individuals near such a still would indeed be guilty of the underlying crime. However, since the net drags in too many innocents, even a legislative inference may not be drawn.

The constitutional rule laid down by this Court has been applied in a considerable variety of instructive lower Court and State Court decisions. Some more recent illustrations will show the breath of the rule. For example, it has been held that a statutory presumption of intent to injure competition derived from sales below or near cost is unconstitutional. *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70 (D.Minn. 1938); *Mott's Super Markets, Inc. v. Frassinelli*, 25 Conn. Sup. 160, 199 A.2d 16 (1964); *Wiley v. Sampson-Ripley*, 151 Me. 400, 120 A.2d 289 (1956). It has been held that a legislative presumption of gambling derived from possession of a federal gambling stamp is unconstitutional. *Jefferson v. Sweat*, 76 So.2d 494 (Fla. 1954). A statute presuming fraud from failure to perform a contract is unconstitutional. *Rawdon v. Garvie*, 227 S.W.2d 261 (Tex. Cir. App. 1950). Possession of a needle suitable for narcotics may not be made presumptive proof of intent to use

such narcotics unlawfully. *State v. Birdsell*, 235 La. 396, 104 So.2d 148 (1958); *People v. Bellfield*, 210 N.Y.S.2d 450 (1961). Receipt of stolen property from a minor may not be made the basis of a presumption that the defendant adult knew that it was stolen by a statute. *People v. Stevenson*, 26 Cal. Repts. 297, 376 P.2d 297 (1962). See also *Government of Virgin Islands v. Torres*, 161 F.Supp. 699 (V.I. 1958); *People v. Gazulis*, 212 N.Y.S. 2d 910 (1961). Likewise, it has been held that a statute making the presence of blood on a rape victim's clothing evidence of rape is unconstitutional. *Colon-Rosich v. People*, 256 F.2d 393 (1st Cir. 1958). In all of these cases, a considerable number of people who did the act on which the presumption was based also were guilty of the presumed act. However, there was no necessary connection between the two. Many innocent people might also be covered by the presumption. Hence, it violated due process. As the Supreme Court of Pennsylvania held in *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 7 A.2d 302, 315 (1939), in striking down as unconstitutional a legislative presumption of an employer's negligence derived from proof of discharge of the employee after physical examination or inability to secure another job because of occupational disease:

> "When mere conjectures are by legislative fiat accepted in courts of justice as substitutes for facts and reasonable inferences, our trials will invite the characterization the then leader of the American Bar in 1898, Joseph H. Choate, publicly applied to the trial of Emile Zola . . . 'It *purported*

to be a jury trial, but for reckless disregard of every principle of right and justice, it is without a precedent in modern history.' "

B. *The Presumption of Racial Discrimination Based on a Low Vote is Unconstitutional*

In the instant case, Congress has presumed that because a literacy test is in effect, a low registration or a low vote at the last Presidential Election means that such a test has been instituted or retained for the purpose of engaging in racial discrimination. This is a complete *non sequitur*. A low registration or vote may be caused by a wide variety of factors. For example, the State or subdivision may in fact have a high rate of illiteracy, leading to a low vote in proportion to the total adult population through the perfectly legitimate operation of the test without regard to any racial descrimination at all. Disgust with both presidential candidates may reduce the vote appreciably. Where the strength of one party has traditionally been overwhelming, as in the South, so that local races are for all practical purposes decided in that party's primary election, far fewer voters of all colors will trouble themselves to turn out in the general election to merely endorse a foregone conclusion. The weather, low economic background, and a wide variety of other factors have a bearing on the size of the vote. To attribute a low vote to a misuse of a literacy test is to sweep the guilty and innocent together in a giant dragnet. If this Court's prior standards as to presumptions are to be given anything more than lip-serv-

ice, such a statutory presumption cannot stand the scrutiny of the Bill of Rights.

To illustrate how groundless is the presumption, it is merely necessary to note that the literacy tests in the State of Alaska have been abolished although no one ever alleged that there was any discrimination in voting in that State. Thus the invalidity of the presumption is made quite evident. What Congress has done is to "throw the baby out with the bath." Along with discriminatory use of the literacy tests, it has abolished the tests themselves. This is not an enforcement of the Fifteenth Amendment. An enforcement of a prohibition against discrimination cannot include a substantive change in the law to be enforced broadening it merely because such a substantive change is a convenient way of striking at the prohibited discrimination. There are many ways of eliminating discrimination without knocking down all State restrictions merely because they may have been misused. *In Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 674 (1961), this Court, in dealing with an analogous problem in the labor law field, held that hiring halls could not be banned under the guise of enforcing the prohibition against discrimination merely because they were on occasion misused to engage in such discrimination. This Court said:

> "There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that

encourages or discourages union membership."

The pith of the dispute here is that Congress, finding evidence of occasional misuse in Southern States of literacy tests to engage in racial discrimination, and becoming impatient with the shole judicial process in eradicating such discrimination, decided to short-circuit this process by abolishing literacy tests completely instead of giving either the Courts or Administrators additional power to eradicate such prohibited discrimination. This is just the sort of legislative hysteria leading to unconstitutional short-cuts which the Bill of Rights was designed to prohibit. If due process means anything, it means that congressional frenzy or impatience is not a good excuse for cutting a seeming Gordian knot by brushing away the exercise of legitimate State powers. If any proof is needed that Congress has taken leave of its constitutional scruples, it is Section 4 (c) of the Voting Rights Act, recently held unconstitutional in *Morgan v. Katzenbach*, (U.S. Dist. Ct., Dist. of Col., Nov. 15, 1965, unreported.). Instead of carefully weeding out the remnants of resistance to the Fifteenth Amendment, Congress has been shooting from the hip with all sorts of trigger clauses which leave gaping holes in State statutes, however fairly they are administered. The Fifteenth Amendment does not give the Congress this sort of ammunition.

It is not as if Congress is being compelled to assume unconstitutional powers because it is patently impossible to eradicate racial discrimination in any

other way, assuming, contrary to all law, that this would be an excuse. No one has suggested that the Civil Rights Division of the Department of Justice, which has the primary task of enforcement, is either incompetent or apathetic. Nor can it be justly claimed that the Federal Judiciary is lethargic, even in the South. Moreover, this Court, as the capstone of the Judiciary, does not let grass grow under anyone's feet, either. See *Mississippi v. United States*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965). There is no good reason for Congress to start a whole prairie fire and burn up State statutes wholesale to kill the few remaining weeds of discrimination still surviving in the South.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court hold that insofar as the Voting Rights Act of 1965 suspends literacy tests in a State because 50 per centum of the adult population was not registered or did not vote in November, 1964, the statute is in excess of Congress' power to enact and is void.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
ALFRED AVINS, J.S.D., PH.D.
(Cantab.)
Special Counsel

By _____

December, 1965

CERTIFICATE

I certify that a copy of the above and foregoing Amicus Curiae Brief for the State of Louisiana has been served upon both Plaintiff and Defendant in Original No. 22, United States Supreme Court, October Term, 1965, this ____ day of December, 1965.

_____

Of Counsel

B-441, 12-65